IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFFS' TIME BARRED CLAIMS AND INTEGRATED BRIEF IN SUPPORT (Dkt. No. 1876)

Plaintiffs' Opposition makes clear that the State of Oklahoma has long been aware of the essential allegation of this lawsuit—the claim that the land application of poultry litter on fields in Arkansas and Oklahoma causes natural resource damages in the Illinois River Watershed ("IRW"). Indeed, far from disputing Defendants' factual recitation, Plaintiffs repeat and confirm the very points that warrant application of a time bar. *Compare* Defs.' Mot., Dkt. No. 1876 at 1-8 ("Mot."), *with* Pls.' Opp., Dkt. No. 1917 at 1-5 ("Opp."). Plaintiffs acknowledge that Oklahoma officials have made these allegations "[f]or many years." Opp. at 2. They confirm that during the 1980s and 1990s various Oklahoma agencies and officials were on notice of allegations that nutrient runoff from various sources (including poultry litter) could cause eutrophication in the IRW if not properly managed. *See id.* at 2-3. And they do not dispute that for over a decade the State of Oklahoma not only delayed filing suit, but in fact actively regulated and authorized the application of poultry litter as a fertilizer. *See id.* at 3-4.

Plaintiffs' principal response is that the State, as a sovereign, is immune from the application of statutes of limitations. But that simply is not true for all of Plaintiffs' claims. And, for those claims to which a statute of limitations does apply, Plaintiffs admit that their damages reports do not identify recoverable injuries suffered, discovered or linked to Defendants' conduct during the limitations periods. *See* Opp. at 13-14 n.7. Summary judgment is therefore appropriate in whole or in part as to several of Plaintiffs' claims.

I. Plaintiffs' Claim for Natural Resource Damages (Count 2) Is Time Barred

CERCLA prohibits the filing of any natural resource damage ("NRD") claim more than three years "after [t]he date of the discovery of the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1). Plaintiffs do not dispute the basic relevant principles: this period applies to the State; it runs from when the State knew or reasonably should have known of the claim; and knowledge may be held by multiple State actors or agencies. *See* Mot. at 9.

Instead, Plaintiffs argue (again) that CERCLA should be interpreted "liberally." Opp. at 6-7. But even the most liberal interpretations cannot overcome CERCLA's clear command that "no [NRD] action may be commenced [later than] 3 years after [t]he date of the discovery of the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1).

The undisputed facts demonstrate that Oklahoma has known for decades not merely of some diffuse "general practice" or unspecified "issue" as Plaintiffs now claim, Opp. at 7-8, but rather of the specific conduct and allegations addressed in this lawsuit. For nearly three decades, Oklahoma officials have voiced concern over the effects of excess nutrients in the IRW and have asserted that some of those nutrients may come from the use of poultry litter. *See* Mot. at 1-8. During the 1980s and 1990s, Oklahoma was put on notice of theories linking litter application to nutrient runoff and water quality degradation. *See id.* at 2-4. Oklahoma officials studied these allegations, and in 1998, enacted a comprehensive scheme to govern the use of poultry litter designed to address the injuries now alleged. *See id*. at 3, 5-7.[1] Since then, Oklahoma has regulated, authorized, and even encouraged, the conduct in question. *See id*. at 7-8. Given the many State officials and agencies on notice of the allegations that Plaintiffs now repeat, the State clearly had the requisite knowledge to trigger CERCLA's statute of limitations.[2]

Plaintiffs' arguments to the contrary are unavailing. *First*, Plaintiffs cite no basis for their suggestion that, because farmers continue to apply litter today, Plaintiffs can reach back decades

[1] Plaintiffs cling to the curious argument that the State does not authorize application of poultry litter "to fields where phosphorous is no longer required to meet plant needs." Opp. at 3. Yet, Plaintiffs ignore the fact that pursuant to Nutrient Management Code 590, 2 O.S. § 10-7.D.3; O.A.C. § 35:17-5-3(b)(6)-(7), ODAFF issues Animal Waste Management Plans ("AWMP") that specifically authorize farmers to apply litter to fields in excess of STP 65, *see* O.A.C. § 35:17-5-5(a)(6); Ex. A at ODKA0016181-82; Ex. B at 510:4-524:18; Ex. C at 81:11-83:6, 243:19-244:19.

[2] Indeed, Plaintiffs have admitted such knowledge by identifying dozens of reports and studies—many of which were published in the 1980s and 1990s by Oklahoma officials *and/or* existed in the State's possession at that time—as evidence that "the IRW has been injured by or become contaminated with [specific substances] disposed of or released by" Defendants. Ex. D at Nos. 9-11 (listing 23 distinct studies); *see also, e.g.*, Ex. E at Nos. 2-6, 10 (listing 68 distinct studies).

to recover damages for conduct and injuries of which the State was aware. *See* Opp. at 7-10, 10 n.5. Such an interpretation would gut 42 U.S.C. § 9613(g)(1), which quite clearly cuts off suits more than three years after a loss is discovered.[3]

Second, Plaintiffs now argue that the statute of limitations should run from the discovery of individual "releases" and "losses" from specific applications of poultry litter.[4] Opp. at 7-8. This flatly contradicts Plaintiffs' arguments elsewhere that such evidence is "irrelevant," *see* Dkt. No. 1913 at 7, and indeed Plaintiffs' own theory of this case. Plaintiffs have not attempted to link particular applications of litter to particular pollution. *See* Ex. F at 25:9-27:23; Ex. B at 897:19-898:4. Instead, Plaintiffs have insisted on litigating this case on an industry-wide basis through generalized allegations of injury.[5] Plaintiffs have asserted that *every* application of poultry litter causes harm,[6] and have refused to parse their claims as to specific defendants, "releases," "losses" or land.[7] It is too late in the day for Plaintiffs to try this fundamental shift.

At this stage, Plaintiffs "must set forth specific facts showing a genuine issue for trial." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004). Yet nowhere do they

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[3] *See United States v. Montrose Chem. Corp.*, 883 F. Supp. 1396, 1403 (C.D. Cal. 1995) (dismissing claim where Plaintiffs failed to satisfy the discovery prong of § 9613(g)(1)), *rev'd on other grounds*, 104 F.3d 1507 (9th Cir. 1997); *Haenchen v. Sand Prods. Co.*, 626 P.2d 332, 334 (Okla. Civ. App. 1981) (limiting damages to the two years preceding the filing of a nuisance suit based on a continuing injury caused by flooding of neighbor's dam).

[4] Plaintiffs acknowledge that, if this release-specific argument is correct, they are limited to damages occurring within the prior three years. *See* Opp. at 9.

[5] *E.g.* Ex. G at 59:20-23 ("[Defendants] want to make it very narrow and it's not a narrow case . . . it's a case about pollution caused by the improper waste disposal practices of the defendants.").

[6] *See, e.g.*, Opp. at 8 (arguing that every litter application causes environmental damages); Ex. H at No. 9 (alleging that "each poultry grower operation . . . is a source of contamination"); Ex. I at No. 7 (describing the undifferentiated application of litter as a CERCLA release); Ex. J at 2 Nos. 2-3 (describing every application of poultry litter in the IRW as a release or threatened release).

[7] *See, e.g.*, Dkt. No. 131 at 6-7 (Nov. 18, 2005) (asserting that Defendants have "ample knowledge as to where the poultry [litter] . . . has been deposited, stored, disposed of, or placed," and "ample knowledge as to where the poultry [litter] . . . has ultimately otherwise come to be located")); Ex. K at Nos. 7-14 (citing undifferentiated ODAFF records and grower/applicator files as evidence of releases); Ex. E at No. 5 (claiming that injuries asserted are "indivisible").

identify any specific "release," "loss" or conduct of any defendant from which the limitations period should run. Instead, Plaintiffs merely repeat the general allegation that "[e]ach release of phosphorous from Defendants' past and present land application events" causes injury. Opp. at 8. But Plaintiffs' own evidence says otherwise. Plaintiffs focus only on applications to fields with what they deem to be excess nutrients. *See* Opp. at 3; Ex. L at No. 3.1 (seeking cessation of litter application only on areas "unsuitable for land application"). Plaintiffs admit that litter has not been applied to all land in the IRW. *Compare* Dkt. No. 1872 at 4 ¶19, *with* Dkt. 1913 at 7 ¶19 (poultry litter only applied on pasture land); *see id.* at 1 ¶2. Further, many fields in the IRW have STP readings below Plaintiffs' standard, to which even they agree that litter might be applied without nutrient runoff. *See*, *e.g.*, Ex. B at 495:13-25; Ex. A at OKDA0016182. Indeed, this very day, application of litter to fields measuring in excess of STP 65 is authorized by State-approved AWMPs designed specifically to avoid the harms Plaintiffs assert are implicit in every single litter application. *See id.*; Mot. at 5-7. Because not every application of litter results in environmental harm, Plaintiffs were required to identify those that they claim do.

Finally, Plaintiffs' *entire* CERCLA claim fails as a matter of law because they have not identified any recoverable damages discovered, incurred or caused during the limitations period.[8] None of Plaintiffs' damages account for the applicable limitations periods. *See* Mot. at 12-18. Rather, Plaintiffs' experts present their damages calculations as an undifferentiated mass. *See* Mot. at 15-18. Plaintiffs' lone responsive footnote largely concedes the point, *see* Opp. at 13-14 n.7, as Plaintiffs make no defense at all of the Future Damages or King reports. As to their Past

[8] Plaintiffs try several times to insulate themselves from the preemptive effect of CERCLA as discussed in the Tenth Circuit's decision in *New Mexico v. General Electric Co.*, 467 F.3d 1223, 1247-48 (10th Cir. 2006). *See* Opp. at 6 n.4; *id.* at 17 (citing *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 2009 WL 455260 (N.D. Okla. Feb. 23, 2009). Obviously, these issues are not before the Court at this time. Plaintiffs are, however, wrong with regard to these authorities, which are better addressed after the Court resolves Defendants' pending motion for summary judgment as to Plaintiffs' CERCLA claims.

Damages Report they agree that it "is not apportioned to the [statutory period]." Opp. at 14 n.7. Instead, it is based on undifferentiated "continuous conduct from 1981 to 2008." *Id*. Similarly, Plaintiffs' Future Damages Report is based on undifferentiated conduct starting in 1960. *See* Mot. at 16-17. None of these provides any basis for assessing natural resource damages during the relevant limitations periods. Therefore, these reports are not evidence of damages within the statutory period. *See, e.g., Burlington N. & Santa Fe. Ry. v. Grant*, 505 F.3d 1013, 1027-29 (10th Cir. 2007) (requiring proof of specific damages during the statutory period).

In fact, the only specific injuries Plaintiffs reference are a handful of response costs set out in two declarations attached to their CERCLA Opposition, which regard analyses and testing conducted by DEQ and the OWRB. *See* Opp. at 14 n.7 (citing Dkt. No. 1913 Exs. 6 & 7). These declarations are insufficient for several reasons. First, many of these costs fall outside the statutory period. *See* Dkt. No. 1913 Ex. 6 ¶3(a)-(b); Dkt. No. 1913 Ex. 7 ¶2(c)-(e). Second, the declarations focus principally on testing for "arsenic, copper, and zinc." *Id.* ¶4; Dkt. No. 1913 Ex. 6 ¶3(c). But, as demonstrated in Defendants' CERCLA papers, Plaintiffs have adduced no evidence to substantiate any injuries flowing from arsenic, copper or zinc. *See* Dkt. No. 1872 at 5-8; Dkt. No. 1925 at 5-6. Third, nothing in either declaration attributes these costs to Defendants' conduct. Rather, the State incurred these costs pursuant to its obligations under federal law and as part of ongoing state programs that exist independent of whether poultry litter is used as a fertilizer.[9] Plaintiffs therefore cannot attribute these costs to Defendants.[10]

[9] The analyses were conducted for the Ambient Trends Program, the Beneficial Use Monitoring Program, development of Total Maximum Daily Loads ("TMDL"), joint sampling with the U.S. Geological Survey, probabilistic monitoring, development of use assessment protocols, and a Clean Lakes Study. These programs implement federal mandates and would still be performed if there was not one poultry house in either Oklahoma or Arkansas. *See* 33 U.S.C. § 1313(d) (all states must evaluate state waters and implement TMDLs); 33 U.S.C. § 1315(b)(1) (states must submit biannual reports on statewide water quality and beneficial use impacts to EPA); *see, e.g.*, Ex. M at 5-7, App. B; Ex. N at vii-viii, 24-27.

Because Plaintiffs have not identified any specific injuries incurred during the limitation period, or otherwise linked specific damages to specific conduct of any Defendant during the limitation period, summary judgment is appropriate as to Count 2 in its entirety.

II. Plaintiffs' Federal Common Law Nuisance Claim (Count 5) is Time Barred

Plaintiffs agree that Oklahoma's two-year statute of limitations for nuisance claims governs federal common law nuisance claims. *See* Mot. at 10-11; Opp. at 10. Plaintiffs' only response is that the State is immune from this time bar. Plaintiffs are mistaken.

First, the Supreme Court has not "affirmed the vitality of the doctrine of *nullum tempus occurrit regi* as to . . . state governments." Opp. at 13. Quite the contrary, the Court has expressly rejected the proposition that States are generally immune from statutes of limitations in federal court. *See Block v. North Dakota*, 461 U.S. 273, 277-79, 289-90 (1983). While a "sovereign state . . . may prescribe the terms and conditions" under which it litigates "in its own courts," *Raygor v. Regents of the U. of Minn.*, 534 U.S. 533, 542-43 (2002) (internal quotations omitted), the States "can exercise no power over [federal courts] or their proceedings," *United States v. Thompson*, 98 U.S. 486, 490 (1878). Simply put, when a State elects to litigate in federal court, it is a litigant like any other. *See Guaranty Trust Co. v. United States*, 304 U.S. 126, 133-34 (1938);[11] *see also BP America Co. v. Bruton*, 549 U.S. 84, 95-96, 100-101 (2006).

Plaintiffs are also wrong that Oklahoma's immunity from its own rules, in its own courts,

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[10] The courts have repeatedly rejected efforts by government entities to recover the cost of public services from specific defendants. *See, e.g., United States v. Standard Oil*, 332 U.S. 301, 316 (1947); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Cmw. Ct. 1986); *Koch v. Con. Edison Co. of N.Y., Inc.*, 468 N.E.2d 1, 8 (N.Y. 1984); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984); *State v. Standridge*, 676 S.W.2d 513, 516-17 (Mo. 1984); *Freetown v. New Bedford Wholesale Tire*, 423 N.E.2d 997, 998 (Mass. 1981); *State Dep't of Social Welfare v. Dye*, 466 P.2d 354, 356 (Kan. 1970).

[11] Plaintiffs dismiss *Guaranty Trust* as relating to "sovereign immunity." Opp. at 13 n.6. They overlook, apparently, that the doctrine of *nullum tempus occurrit regi* is a species of sovereign immunity, *see Raygor*, 534 U.S. at 542-43, which is why *Guaranty Trust* is squarely on point.

governs the "application" of the limitations period in federal court. Opp. at 11-12. Plaintiffs' own authorities make clear that federal courts are concerned principally with rules governing the chronological length of the borrowed statutory period, not whether particular litigants have special rights under state law. *See Hardin v. Straub*, 490 U.S. 536, 538-39 (1989) ("In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." (internal quotations, citations omitted)); *see also* Wright, Miller & Cooper, 19 FEDERAL PRACTICE AND PROCEDURE JURISDICTION § 5419 at 20 (federal law borrows state rules that govern the running of the clock).

Moreover, Plaintiffs ignore completely the other half of the borrowing test (set out in all of the cases they cite), whereby federal law will *never* borrow a state rule that contravenes federal law or policy. *Compare* Mot. at 11, *with* Opp. at 11.[12] Plaintiffs cite no federal case borrowing a State's immunity from its own statutes of limitations into federal law precisely because the doctrine of *nullum tempus occurrit regi* is clearly contrary to the federal policy of time-limiting claims. Statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)); *see also Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554-55 (1974). Plaintiffs' suggestion that a state litigant in federal court may *by dint of state law* substantively expand its own rights *under federal law* and press a suit, no matter how many years stale, directly contradicts this policy. For this reason, unless Congress has specifically provided

[12] *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 465 (1975); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355-56, 362 (1991); *Hardin*, 490 U.S. at 539; *Lujan v. Regents of the Univ. of Cal.*, 69 F.3d 1511, 1516 n.5 (10th Cir. 1995); *In re Mushroom Transp. Co.*, 382 F.3d 325, 335 (3d Cir. 2004).

otherwise, states litigating in federal court are subject to the same limitations periods as all other litigants. *See, e.g.*, *Block*, 461 U.S. at 287-88 (applying statute of limitations to state litigant where "[t]he statutory language makes no exception for civil actions by States[, n]or is there any evidence in the legislative history suggesting that Congress intended to exempt the States").

Plaintiffs therefore must demonstrate recoverable damages within the two-year limitations period. *See Burlington N.*, 505 F.3d at 1027-29; Mot. at 12-14 (citing authorities). Plaintiffs have abandoned any claim to permanent damages under their federal nuisance count, and therefore concede that summary judgment is appropriate as to those claims. *See* SAC ¶113; Mot. at 12-14.[13] Instead, Plaintiffs focus solely on "temporary" or ongoing injuries. Opp. at 13-14 n.7. As to those, Plaintiffs merely assert that "Defendants are well aware that the State has alleged and demonstrated ongoing and continuous nuisance-causing conduct by the Defendants that continues to this day." *Id.* (citing SAC ¶113). But such unsupported assertions are inadequate to survive summary judgment. Again, Plaintiffs "must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Seaboard Farms*, 387 F.3d at 1169. As detailed above, Plaintiffs fail to present any differentiated proof of damages. *See infra* at 4-5. Because Plaintiffs have not identified specific injuries incurred or discovered during the limitations period, or otherwise related to Defendants' conduct during the limitations period, summary judgment is appropriate as to Count 5.[14]

III. Plaintiffs' State Law Nuisance (Count 4), Trespass (Count 6), and Claims on Behalf of Private Individuals (Counts 4 & 10) Are Time Barred

Summary judgment is also appropriate as to several of Plaintiffs' state law claims. *First*,

[13] *See Campfield v. State Farm Mut. Auto Ins. Co.*, 532 F.3d 1111, 1122 (10th Cir. 2008) (arguments not raised in opposition to summary judgment motion are waived).

[14] Even if the Smithee and Duncan Declarations did identify recoverable response cost(s) (which they do not), Plaintiffs are appropriately limited to recovering only those costs identified with particularity in their Opposition.

Plaintiffs jettison their claim of private nuisance. *See* Opp. at 14-17. Plaintiffs' lengthy discourse on nuisance goes entirely to their public nuisance claim, *see id.*, which Defendants do not challenge at this time, *see* Mot. at 18.[15] Partial summary judgment is therefore appropriate as to private nuisance. *See* SAC ¶100 (alleging in part a *private* nuisance).

Second, with regard to trespass, Plaintiffs attempt to walk back from their prior admission that they are not pursuing this claim in the State's *parens patriae* capacity. *Compare* Opp. at 17-18, *with* Mot. at 19-20; *see* Dkt. No. 1111 at 17. They assert now that trespass goes not merely to "government property," but to the "public interest." Opp. at 18. However, the Court has already ruled that Plaintiffs cannot pursue trespass on any basis other than the State's possessory interests. *See* Ex. O at 176:11-22. Pursuant to the Court's Order, Plaintiffs limited Count 6 to the State's "possessory property interest" in State waters. SAC ¶119. The law of trespass is clear that a claim predicated on a specific possessory interest, even in *public* land, is *private* in nature and subject to the statute of limitations. *See, e.g.*, *New Mexico v. General Electric*, 335 F. Supp. 2d 1185, 1233-34 (D.N.M. 2004) (rejecting a similar claim of trespass in state waters).[16] Plaintiffs cannot now fall back on some generalized interest in the waters of the State.[17]

Third, Plaintiffs ignore Defendants' demonstration that the applicable statute of limitations governs any claim predicated on a private right. With respect to Count 4, Plaintiffs discard any such claim entirely. *See* Opp. at 15 ("[In] Count 4, the State is seeking damages and

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[15] Whether Plaintiffs' public nuisance claim is time-barred depends on whether they are pursuing a public right. Despite Defendants' vigorous discovery efforts, the precise contours of that claim remain vague. Therefore, Defendants have not sought to resolve that issue in this Motion. Moreover, Defendants will challenge Plaintiffs' nuisance claim in a separate motion.

[16] *Herndon v. Board of Commissioners*, 11 P.2d 939, 941 (Okla. 1932), merely states the general rule that statutes of limitations run against claims for private rights but not claims for public rights. Here, Plaintiffs have specifically disclaimed any public trespass claim.

[17] Moreover, as explained in Defendants' pending Rule 19 motion to dismiss for failure to join the Cherokee Nation, the Cherokee Nation, not the State of Oklahoma, likely stands behind natural resource ownership rights in the IRW. *See* Dkt. No. 1788. If that is the case, then Plaintiffs have no public interest in the waters at all.

other relief for . . . public rights, not private rights."); *supra* at 8-9. Nor do Plaintiffs dispute Defendants' showing that Count 10, alleging claims of unjust enrichment / restitution / disgorgement, seeks in part to recover for the rights of private landowners. *See* Mot. at 20-21. For each of these claims (Count 4 as to private nuisance, Count 6 in its entirety, and Count 10 as to the rights of private landowners), the Motion makes clear that Oklahoma knew of Plaintiffs' allegations long before the statutory period, and that Plaintiffs have not parsed their damages either to fit within the limitations period or to differentiate between public and private rights. Therefore, summary judgment should be entered on these claims.

IV. Plaintiffs Cannot Recover Pre-Enactment Damages Under Their Oklahoma Statutory and Regulatory Claims

Plaintiffs admit, as they must, that summary judgment for Defendants is appropriate as to claims for pre-enactment damages under the statutes they cite in Counts 7, 8 and 9. Opp. at 18; SAC §§ G, H & I. Plaintiffs' only point of disagreement regards Oklahoma's general anti-pollution statute, 27A O.S. § 2-6-105, cited in Count 7, which Plaintiffs argue dates back to 1955. *See* SAC § 131. Plaintiffs are correct that the statutory language tracks back to 1955. *Compare* Ex. P, 82 O.S.A. § 907(a) (1955), *with* 27A O.S. § 2-6-105 (current). However, the penalties attendant to this provision changed substantially in 1993. *Compare* Ex. Q, 82 O.S. § 926.10 (1991), *with* Ex. R, 27A O.S. § 2-3-504 (1993). The 1993 amendments provided for attorneys fees and otherwise expanded the available remedies. Retroactive application of damages provisions is similarly prohibited absent a clear legislative statement to the contrary. *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Sudbury v. Deterding*, 19 P.3d 856, 860 (Okla. 2001). Summary judgment is therefore also appropriate as to Count 7 to the extent that Plaintiffs seek a recovery under 27A O.S. § 2-6-105 for conduct prior to 1993 in excess of the then-applicable damages provision, or an undifferentiated recovery.

Respectfully submitted,

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I certify that on the 24th of March, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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